

Before the
Administrative Hearing Commission
State of Missouri



LEWAM HABTEMICHAEL,

Petitioner,

v.

STATE BOARD OF NURSING,

Respondent.

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No. 14-0856 BN

DECISION

We grant Lewam Habtemichael an unrestricted license as a registered professional nurse (“RN”).

Procedure

On May 23, 2014, Habtemichael filed a complaint appealing the State Board of Nursing’s (“Board”) order of January 16, 2013 granting her a license subject to probation for five years. The Board filed its answer on June 6, 2014. This Commission convened a hearing on October 16, 2014. Ian Hauptli represented the Board, and Habtemichael was represented by Gerard Diekman of Diekman & Leightner. The matter became ready for our decision on January 8, 2015, the date the last written argument was due.

Findings of Fact

1. In January 2009, in Overland, Missouri, Habtemichael drove while she was intoxicated. On March 11, 2009, Habtemichael pled guilty to the ordinance violation of driving

while intoxicated (“DWT”) in the municipal court of Overland. She was given a suspended imposition of sentence and placed on probation for two years, during which she was not to commit any other alcohol-related offenses.

2. In August 2009, in University City, Missouri, Habtemichael again drove while she was intoxicated. On March 3, 2010, in the Municipal Court of University City, Habtemichael pled guilty to the ordinance violation of driving with blood alcohol content in excess of the legal limit and paid a fine for that offense.

3. Despite the second alcohol-related offense, Habtemichael was deemed to have successfully completed probation in Overland.¹

4. On September 3, 2011, in St. Louis County, Habtemichael was arrested for intoxicated driving for a third time.

5. On December 23, 2011, Habtemichael graduated from the Goldfarb School of Nursing in St. Louis, Missouri, with a bachelor of science degree in nursing.

6. Habtemichael quit drinking on February 28, 2013.

7. On March 7, 2013, Habtemichael pled guilty to DWI as a persistent offender, a Class D felony. Habtemichael’s sentencing was deferred while she enrolled in the St. Louis County Alternative Sentencing Program and signed an agreement to adhere to the requirements of the County’s DWI Court.

8. As a participant in the DWI Court program, Habtemichael was required to meet with the judge every Friday, attend weekly meetings of Alcoholics Anonymous (“AA”), see her counselor at Bridgeway Behavioral Health (Bridgeway) twice a week, and submit to randomly ordered urine drug and alcohol screens up to three times per week.

¹ We have no information that the Overland Municipal Court was ever notified of the second offense and resulting violation of the probation order and agreement she signed on March 11, 2009.

9. On June 20, 2013, Habtemichael applied for licensure as an RN. On January 15, 2014, the Board approved Habtemichael's application to sit for the registered nurse licensure examination administered by the National Council of State Boards of Nursing ("NCLEX").

10. Because Habtemichael disclosed in the application that she had a criminal history related to driving while intoxicated, the Board notified her that it would issue her a probated license effective on the date the Board received information from NCLEX of Habtemichael's passing score.²

11. Habtemichael passed the NCLEX. On April 28, 2014, the Board issued her a license to practice as an RN, subject to probation for a period of five years with specific terms and conditions.

12. The significant terms and conditions of Habtemichael's probated license include providing quarterly evaluations by her work supervisors to the Board, random drug and alcohol screens with a Board-approved, third-party administrator, abstinence from alcohol, quarterly treatment evaluations from a chemical dependency professional, and attendance at AA or similar support groups.

13. Throughout her application process to obtain her license from the Board, Habtemichael was truthful about her history of driving while intoxicated and cooperative and compliant with all requests for documents.

14. Habtemichael successfully completed the outpatient behavioral health component of DWI Court, through Bridgeway, and completed the rest of the requirements for DWI Court without violation. Certificates of completion for both programs were issued May 22, 2014.

² The Board's customary procedure is to order that a probated license issue upon passage of the exam.

15. Upon completion of all requirements of the DWI Court program, Habtemichael was allowed to withdraw her plea of guilty to the Class D felony and plead guilty to the amended charge of the Class A misdemeanor of DWI as a prior offender.

16. Habtemichael is on probation for the misdemeanor DWI conviction until May 2016. Her conditions of probation include random drug/alcohol testing, monthly meetings with her DWI Court class, maintaining an ignition interlock device on her car, and attending three community-based support meetings (like AA) per week.

17. Habtemichael was evaluated by an addiction specialist, who considers her to be in remission. She understands that her addiction to alcohol will require lifelong management.

18. At the time of the hearing, Habtemichael worked as an RN at Menzies Institute for Recovery of Addiction and had worked there since May of 2014.

19. To date, Habtemichael's probated license has not interfered with her attempts to find employment, but she fears that it will.

Conclusions of Law

We have jurisdiction to hear Habtemichael's complaint. Section 324.038.2.³ The Board has the burden of proving the existence of the basis for imposing probation on the license. *Id.* The degree of proof is a preponderance of the evidence. A preponderance of the evidence is evidence showing, as a whole, that "the fact to be proved [is] more probable than not." *See Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 230 (Mo. App. W.D. 2010) (*quoting State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000)).

We decide the issue that was before the Board, which is the application. *See Department of Soc. Servs. v. Mellas*, 220 S.W.3d 778 (Mo.App. W.D. 2007). In doing so, we exercise the same authority that has been granted to the Board. *J.C. Nichols Co. v. Director of Revenue*, 796

³ Statutory citations are to the RSMo Cum. Supp. 2013 unless otherwise indicated.

S.W.2d 16, 20 (Mo. banc 1990). Therefore, we simply decide the application *de novo*. *State Bd. of Regis'n. for the Healing Arts v. Trueblood*, 324 S.W.3d 259, 264-67 (Mo. App. W.D. 2012).

When an applicant for licensure files a complaint, the agency's answer provides notice of the issues. *Ballew v. Ainsworth*, 670 S.W.2d 94, 103 (Mo. App., E.D. 1984). In its answer, the Board asserts there is cause to deny Habtemichael a license under § 335.046.1, RSMo 2000, which provides that an applicant for a license to practice as an RN must "be of good moral character," and § 335.066.1 and .2(2), which provide:

1. The board may refuse to issue or reinstate any certificate of registration or authority, permit or license required pursuant to chapter 335 for one or any combination of causes stated in subsection 2 of this section or the board may, as a condition to issuing or reinstating any such permit or license, require a person to submit himself or herself for identification, intervention, treatment, or rehabilitation by the impaired nurse program as provided in section 335.067. The board shall notify the applicant in writing of the reasons for the refusal and shall advise the applicant of his or her right to file a complaint with the administrative hearing commission as provided by chapter 621.

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority, permit or license required by sections 335.011 to 335.096 or any person who has failed to renew or has surrendered his or her certificate of registration or authority, permit or license for any one or any combination of the following causes:

- (2) The person has been finally adjudicated and found guilty, or entered a plea of guilty or nolo contendere, in a criminal prosecution pursuant to the laws of any state or of the United States, for any offense reasonably related to the qualifications, functions or duties of any profession licensed or regulated pursuant to sections 335.011 to 335.096, for any offense an essential element of which is fraud, dishonesty or an act of violence, or for any offense involving moral turpitude, whether or not sentence is imposed[.]

Good Moral Character

Good moral character is honesty, fairness, and respect for the law and the rights of others. *Hernandez v. State Bd. of Regis'n for Healing Arts*, 936 S.W.2d 894, 899 n.1 (Mo. App. W.D. 1997). When the licensing agency proves a criminal conviction, we determine the applicant's moral character from her conduct, present reputation, evidence of any rehabilitation, and upon a consideration of the entire set of facts. *State Bd. of Regis'n for the Healing Arts v. Finch*, 514 S.W.2d 608, 614 (Mo. App., K.C.D. 1974). *See also State Bd. of Regis'n for the Healing Arts v. DeVore*, 517 S.W.2d 480, 486 (Mo. App., K.C.D. 1974). We are guided by § 314.200, RSMo 2000, which states:

No board or other agency created pursuant to laws of the state of Missouri, or by any city, county or other political subdivision of the state, for the purpose of licensing applicants for occupations and professions may deny a license to an applicant primarily upon the basis that a felony or misdemeanor conviction of the applicant precludes the applicant from demonstrating good moral character, where the conviction resulted in the applicant's incarceration and the applicant has been released by pardon, parole or otherwise from such incarceration, or resulted in the applicant being placed on probation and there is no evidence the applicant has violated the conditions of his probation. The board or other agency may consider the conviction as some evidence of an absence of good moral character, but shall also consider the nature of the crime committed in relation to the license which the applicant seeks, the date of the conviction, the conduct of the applicant since the date of the conviction and other evidence as to the applicant's character.

We note, first, that the Board's position that Habtemichael lacks good moral character is inconsistent with its decision to grant her any sort of license, even a probated one, as good moral character is a qualification for a nursing license. Perhaps that is why the Board, despite the allegation in its answer, did not argue this point in its brief. Nonetheless, we find that Habtemichael possesses good moral character. She clearly made poor decisions about drinking and driving between 2009 and 2011. Such decisions indicated a lack of respect for the law and

could have endangered not only her life, but the lives of other people. They are evidence of bad moral character.

But Habtemichael quit drinking in 2013 and her actions since that time demonstrate a commitment to recovery. Her sobriety since that time, her compliance with the rigorous requirements of the DWI court, and her continued engagement with recovery activities convince us that she presently has good moral character.

Reasonably Related to Qualifications of a Nurse

Habtemichael pled guilty in a criminal prosecution under the laws of this state. Here, the Board argues not that Habtemichael lacks good moral character, but that the crime of driving while intoxicated is reasonably related to the qualifications of nursing because it shows a lack of good moral character in that it involves respect for the laws of the state.⁴ We consider only Habtemichael's guilty plea to the Class A misdemeanor here, as the Class D felony charge was amended to the Class A misdemeanor, and the municipal ordinance violations are not criminal offenses. *City of Cape Girardeau v. Jones*, 725 S.W.2d 904, 906 (Mo. App., E.D. 1987). Likewise, they were not prosecuted under "the laws of any state."

"Reasonably related" is a low threshold, but not a meaningless one. To relate is to show or establish a logical or causal connection. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 1916 (unabr. 1986). "Reasonable" means "being or remaining within the bounds of reason: not extreme: not excessive;" and "not conflicting with reason: not absurd: not ridiculous." *Id.* at 1892. We conclude that for a criminal offense to be reasonably related to the qualifications for a profession, the relationship between the offense and the profession must be logical and not strained or exceedingly tenuous.

⁴ The Board does not contend, or argue, that the crime of DWI is reasonably related to the functions or duties of nursing, so we do not address that point.

We find the Board’s argument that the offense is reasonably related to the qualifications for a nurse to fall into the latter category. By its logic, *any* crime is reasonably related to the qualifications of a nurse because the commission of any crime may indicate a lack of respect for the law. Such a reading renders the statute’s requirement that the crime be reasonably related to the qualifications for nursing to be nearly meaningless. We find the crime of driving while intoxicated is not reasonably related to the qualifications of professional nursing.

Moral Turpitude

The Board also argues that Habtemichael committed an offense involving moral turpitude. Moral turpitude is:

an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man or to society in general, contrary to the accepted and customary rule of right and duty between man and man; everything “done contrary to justice, honesty, modesty, and good morals.”

In re Frick, 694 S.W.2d 473, 479 (Mo. banc 1985) (quoting *In re Wallace*, 19 S.W.2d 625 (Mo. banc 1929)). We determine whether a crime is one of moral turpitude by utilizing the framework set forth in *Brehe v. Missouri Dep’t of Elementary and Secondary Education*, a case that involved discipline of a teacher’s certificate under § 168.071 for committing a crime involving moral turpitude. The *Brehe* court referred to three classifications of crimes:

- (1) crimes that necessarily involve moral turpitude, such as frauds (Category 1 crimes);
- (2) crimes “so obviously petty that conviction carries no suggestion of moral turpitude,” such as illegal parking (Category 2 crimes); and
- (3) crimes that “may be saturated with moral turpitude,” yet do not involve it necessarily, such as willful failure to pay income tax or refusal to answer questions before a congressional committee (Category 3 crimes).

213 S.W.3d 720, 725 (Mo. App. W.D. 2007)(quoting *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844, 852 (9th Cir. 1954)). The Court stated that Category 3 crimes require consideration of “the related factual circumstances” of the offense to determine whether moral turpitude is involved. *Id.*

Our decisions are not precedential. *Fall Creek Const. Co. v. Director of Revenue*, 109 S.W.3d 165, 172 (Mo. banc 2003). We often look to them for guidance, but on this topic, they are of little aid. In *State Board of Nursing v. Markel Fitchpatrick, Jr.*, No. 04-0898 BN (Mar. 1, 2005), we decided there was no basis for discipline against a nurse for DWI because it was not an offense involving moral turpitude. But we have also, at times, stated that driving while intoxicated is a Category 1 crime, one that necessarily involves moral turpitude. See *Chelsea Spence v. Missouri Real Estate Commission*, No. 13-1652 RE (August 11, 2014); *State Board of Nursing v. Tammy Wilcox*, No. 09-0645 BN (March 19, 2013). We have also determined that driving while intoxicated is a Category 3 crime, one that does not always qualify as a crime of moral turpitude. See *Justin Ratcliff v. Office of Tattooing, Body Piercing and Branding*, No. 11-0739 TP (August 6, 2012); *State Bd. of Nursing v. Sherry Feltrop*, No. 11-0272 BN (August 3, 2012); *Angela Thomas v. Board of Therapeutic Massage*, No. 08-0023 TM (July 31, 2008). In short, we have been inconsistent in deciding whether DWI is a crime of moral turpitude.

The weight of authority from other jurisdictions recognizes that it is not. *Maxwell v. State*, 620 So.2d 93, 97 (Ala. Crim. App. 1992); *In re Carr*, 46 Cal.3d 1089 (1988); *O’Neal v. Kammin*, 430 S.E.2d 586, 587 (Ga. 1993); *In re Oliver*, 493 N.E.2d 1237, 1241 (Ind. 1986); *State v. Harry*, 468 S.E.2d 76, 80 (S.C. App. 1996); *Flowers v. Benton County Beer Bd.*, 302 S.W.2d 335, 339 (Tenn. 1957); *Lopez v. State*, 990 S.W.2d 770, 778 (Tex. App. 1999); *Vasquez-Atempa v. Ashcroft*, 81 Fed. Appx. 256 (9th Cir. 2003); *Lewis v. Alabama Dep’t of Public Safety*, 831 F. Supp. 824, 826-27 (M.D. Ala. 1993); *In re Lopez-Meza*, 1999 BIA LEXIS 50 (1999).

These authorities, like the majority of our decisions, suggest that driving while intoxicated is, at most, a Category 3 crime. Thus, we must consider the factual circumstances surrounding Habtemichael's 2011 offense of driving while intoxicated. We know little of them, except that she had twice pled guilty in municipal courts to violating DWI ordinances. With that history, we determine that Habtemichael had every reason to abstain from driving after drinking alcoholic beverages. At that point, she should have been aware that her judgment in such situations was poor and that her conduct could not only endanger her life, but the lives of others. We find that her 2011 offense of driving while intoxicated was a crime of moral turpitude.

There is cause to issue Habtemichael a probated license under § 335.066.2(2).

Our Discretion

Having found cause to issue a probated license, we must also determine whether Habtemichael should nevertheless be granted an unrestricted license under § 324.038.1, which provides that a disciplinary authority "may, at its discretion, issue to an applicant a license subject to probation." Habtemichael's appeal vests in this Commission the same degree of discretion as the Board, and we need not exercise it in the same way. *Trueblood*, 368 S.W.2d at 267.

In exercising our discretion, we are guided by several considerations. First, we are mindful that the purpose of the professional licensing laws is to protect the public. *Garozzo v. Missouri Dept. of Ins., Financial Institutions & Professional Regis'n*, 389 S.W.3d 660, 665 (Mo. banc 2013). At the same time, the General Assembly, through its enactment of § 314.200, RSMo 2000, and § 324.029, has established a public policy allowing convicted criminals the opportunity to show sufficient rehabilitation for occupational and professional licensing. Section 324.029 provides: "Except as otherwise specifically provided by law, no license for any occupation or profession shall be denied solely on the grounds that an applicant has been

previously convicted of a felony.” Habtemichael was not convicted of a felony, but a misdemeanor; the public policy expressed by § 324.029 applies, *a fortiori*, to her situation. We must consider whether she is sufficiently rehabilitated to practice as an RN without restrictions on her license.

In doing so, we consider the evidence presented not to the Board at the time it made its initial decision in 2013 to issue Habtemichael a probated license, but at the time of the hearing. As the court stated in *Missouri Real Estate Appraisers Comm'n v. Funk*, 306 S.W.3d 101, 105 (Mo. App. W.D., 2010):

[T]he AHC was entitled to conduct a fresh inquiry into whether Funk was deserving of certification, based upon the entire record of relevant admitted evidence pertaining to certification. *Dep't of Soc. Servs., Div. of Med. Servs. v. Senior Citizens Nursing Home Dist. of Ray County*, 224 S.W.3d 1, 15 (Mo.App. W.D.2007) (“The commission actually steps into the department's shoes and becomes the department in remaking the department's decision. This includes the exercise of any discretion that the department would exercise.”) Thus, the inquiry of the AHC was whether, ***at the time of the AHC hearing***, Funk met the requirements for general real estate appraisal certification as outlined in sections 339.511.3 and 339.535

(Emphasis added; footnotes omitted).

An applicant claiming rehabilitation should acknowledge guilt and embrace a new moral code. *Francois v. State Bd. of Regis'n for the Healing Arts*, 880 S.W.2d 601, 603 (Mo. App., E.D. 1994). We have, in the past, found applicants for licensure with criminal histories,⁵ or who engaged in substance abuse,⁶ to be rehabilitated. Those cases have several commonalities. In all

⁵ See *Redempta M. Kimanzi vs. State Bd. of Nursing*, No. 08-2028 BN (August 5, 2009); *John Farrar vs. Missouri Real Estate Appraisers Commission*, No. 08-0912 RA (April 9, 2009); *Michael C. Cooper d/b/a Cooper's Landing vs. Supervisor of Liquor Control*, No. 04-0858 LC (October 21, 2004); *Sharrisse Walls vs. State Bd. of Nursing*, No. 03-1933 BN (April 1, 2004); and *John T. Ryan, D.C. vs. State Bd. of Chiropractic Examiners*, No. 99-0458 CX (January 3, 2000).

⁶ See *Vanessa Ampofo v. State Board of Pharmacy*, No. 08-1202 PH (May 4, 2009); *James A. Brockenbrough v. State Bd. of Regis'n for the Healing Arts*, No. 08-0994 HA (May 4, 2009); and *Christine Ann Trueblood v. State Bd. of Regis'n for the Healing Arts*, No. 09-0795 HA (August 11, 2010); *Finley v. Missouri Real Estate Commission*, No.14-1134 RE (September 25, 2014).

of them, the applicants candidly acknowledged past crimes or conduct, and showed that they had embraced a new moral code. They took responsibility for their actions and demonstrated absolute honesty in admitting their mistakes. The passage of time between the bad conduct and the license application is one, but not the only, factor considered. Along with the passage of time, the applicants presented evidence of progress at work or in school and often changes in lifestyle.

At the time of the hearing, Habtemichael had been sober for nearly two years. She completed the requirements of the DWI Court. The conditions of her probation from the court, which will extend until May 2016, include random drug testing and participating in recovery activities. Those conditions, which are similar to those imposed by the Board, will help her maintain her sobriety and will function similarly to a two-year probation period from the Board.

Most importantly, Habtemichael understands that maintaining her sobriety will be a lifelong endeavor. A preponderance of the evidence demonstrates that she understands her disease and what she must do to keep it in remission, and that she is sincerely committed to her sobriety and recovery. Particularly in light of the court-imposed requirements of her probation, we conclude she can safely practice as an RN without the need for additional restrictions on her license.

Attorney Fees

In her complaint and her written argument, Habtemichael requests an award of attorney fees. Section 536.087, RSMo 2000, provides that reasonable attorney fees and expenses may be awarded to a party who prevails in an agency proceeding unless the agency finds that the position of the State was substantially justified. Under 1 CSR 15-3.560, such a complaint shall be a separate contested case, governed by § 536.087. Therefore, we dismiss that portion of Habtemichael's complaint requesting attorney fees.

Summary

We grant Habtemichael an unrestricted license to practice as an RN.

SO ORDERED on March 4, 2015.

/s/ Karen A. Winn
KAREN A. WINN
Commissioner